



ENVIRONMENTAL ASSESSMENT BOARD

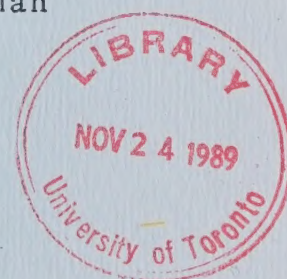
VOLUME: 158

DATE: Tuesday, November 14th, 1989

BEFORE: M.I. JEFFERY, Q.C., Chairman

E. MARTEL, Member

A. KOVEN, Member



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HEARING ON THE PROPOSAL BY THE MINISTRY OF NATURAL
RESOURCES FOR A CLASS ENVIRONMENTAL ASSESSMENT FOR
TIMBER MANAGEMENT ON CROWN LANDS IN ONTARIO

IN THE MATTER of the Environmental
Assessment Act, R.S.O. 1980, c.140;

- and -

IN THE MATTER of the Class Environmental
Assessment for Timber Management on Crown
Lands in Ontario;

- and -

IN THE MATTER OF a Notice by the
Honourable Jim Bradley, Minister of the
Environment, requiring the Environmental
Assessment Board to hold a hearing with
respect to a Class Environmental
Assessment (No. NR-AA-30) of an
undertaking by the Ministry of Natural
Resources for the activity of timber
management on Crown Lands in Ontario.

Hearing held at the Ramada Prince Arthur
Hotel, 17 North Cumberland St., Thunder
Bay, Ontario, on Tuesday, November 14th,
1989, commencing at 1:00 p.m.

VOLUME 158

BEFORE:

MR. MICHAEL I. JEFFERY, Q.C.	Chairman
MR. ELIE MARTEL	Member
MRS. ANNE KOVEN	Member

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1 ---Upon commencing at 1:05 p.m.

2 THE CHAIRMAN: Thank you, ladies and
3 gentlemen. Please be seated.

4 Ladies and gentlemen, as you are probably
5 aware - I have spoken to some of you - I shall have to
6 return to Toronto later this afternoon because of a
7 medical emergency in my family.

8 It is likely, and I think rather than
9 inconvenience all the parties, we will probably have to
10 cancel the remainder of this week, and as far as I know
11 we are scheduled to return on Sunday night to commence
12 Monday. If there is any change in that, I will have
13 Mrs. Devaul advise the parties as quickly as possible.

14 This afternoon I think we should proceed
15 and deal with the two procedural matters to the extent
16 that we can complete them by three o'clock. I am
17 booked on the 4:10 flight going out and I don't feel we
18 should be sitting longer than three.

19 I apologize for this change in
20 circumstances, but it's unavoidable.

21 Ladies and gentlemen, for anybody who
22 wants to address these issues, would they mind coming
23 to the microphone at the podium to address the Board.
24 The court reporters have difficulty picking it up from
25 people talking at the rear tables.

1 In accordance with what we indicated last
2 week, I think we will deal firstly with the submissions
3 from counsel concerning the authority and jurisdiction
4 of the Board to deal in conditions of approval with
5 elements of government policy. I think this is an
6 important issue that we should get clarified at this
7 stage and the Board would be obliged to have the
8 submissions and opinions of counsel vis-a-vis the
9 Board's jurisdiction and submissions regarding any law
10 that may be available to try and clarify some of those
11 areas.

12 Now, we haven't really indicated a
13 particular order, so perhaps we can start with the
14 Ministry and then we'll go around the room and see if
15 anybody else has other submissions to make.

16 Ms. Murphy?

17 MS. MURPHY: Yes. That's fine, Mr.
18 Chairman. I just thought before you commenced I might
19 make a suggestion just for your consideration.

20 Fortunately we had an opportunity to put
21 together a piece of paper that advised people about a
22 position on this matter and we have only been able to
23 provide that to them today, and we have done that, and
24 I think I gave copies of that to Mrs. Devaul, I think
25 you have them.

1 THE CHAIRMAN: Yes.

2 MS. MURPHY: I am just making a
3 suggestion for your consideration. Given that the
4 parties haven't had an opportunity to look at that, it
5 may be wise to give them that opportunity and, if they
6 have that chance, it may be that dealing with this
7 motion could be dealt with really expeditiously perhaps
8 next week.

9 THE CHAIRMAN: All right. Well, why
10 don't we do this, since we do have the time at this
11 point: Why don't we hear from the other parties as to
12 their submissions so that everybody's position to the
13 extent that they've prepared it is out on the table,
14 and then perhaps we'll reserve a short period of time
15 at another time to complete it. So not only will they
16 have your position, which they may not yet have had a
17 chance to consider, but at least everybody will know
18 what each other's positions are.

19 MS. MURPHY: That's fine. Then I have
20 provided a copy of those submissions I think to all the
21 counsel. I have other copies for other people who need
22 them.

23 I was also, for the convenience of
24 counsel, going to file with the Board two cases -
25 actually both of them the Barrie Annexation case - one

1 with the Court of Appeal and also one with the Supreme
2 Court of Canada. I was not going to be making
3 reference to them in any great detail, but I thought it
4 might be useful for all parties to have those cases.
5 I'll provide those now.

6 THE CHAIRMAN: All right.

7 MS. MURPHY: (handed)

8 THE CHAIRMAN: I don't think we are going
9 to exhibit any of this material, it's not part of the
10 evidence.

11 MS. MURPHY: No, I don't think that's
12 necessary.

13 Then, just for your information, what I
14 have done is I have gone back to the original
15 transcript where this question arose and,
16 unfortunately, I just have the pages, I am not sure of
17 the volume number. For your information, the
18 discussion starts on page 27015 essentially and when I
19 have the volume number I'll let you know.

20 It began with a question from you, Mr.
21 Chairman, and you made the statement:

22 "As the Board understands the legal
23 position with respect to policy and
24 policy statements, the Board is obliged
25 to take into account any policy but is

1 not obliged to necessarily, I think the
2 words of the Innisfil case were slavishly
3 follow it, but in arriving at any
4 decision where there was a policy in
5 place, the Board certainly had to
6 consider the policy prior to arriving at
7 its decision."

8 And it's our view that's obviously a
9 correct statement of the law.

10 You went on then, in my view, to ask two
11 questions, and the first one on that page:

12 "...does that allow the Board in its
13 conditions of approval to render a
14 condition which would not deal with
15 whether or not the Board took into
16 account the policy which it must do, but
17 have the effect of forcing a party to
18 contravene that policy by imposing a
19 condition of approval pursuant to the
20 Environmental Assessment Act."

21 So I've set out a question of that
22 nature. If you look at page 2, I've suggested then
23 your question was: Does the Environmental Assessment
24 Board have the authority or the jurisdiction to impose
25 terms and conditions of approval of an undertaking if

1 the conditions would contradict - is the word I've
2 used - current government policy?

3 And then, Mr. Chairman, you went on - and
4 I'm going over the page to page 27018 - and in this
5 case you were talking about what you called a different
6 class of documents, but I would suggest you're asking a
7 slightly different question, and the question is: If
8 the Board - and this is the quote:

9 "...decides that something in one of
10 those guides is unacceptable and in fact
11 should either be deleted or amended...can
12 it, under the auspices of its power to
13 impose terms and conditions under the
14 Environmental Assessment Act, effectively
15 force a change in that kind of document?"

16 And that being the case I've set out as a
17 slightly different second question: Does the
18 Environmental Assessment Board have the authority or
19 the jurisdiction to impose terms and conditions of
20 approval of an undertaking if the conditions would
21 direct a change in current government policy?

22 So I've approached that in attempting to
23 answer those two questions and I've set out what our
24 position is on the answers in the following paragraph.
25 Essentially the answers to both questions are: Yes,

1 the Board does have that jurisdiction, and we've set
2 out what we believe to be the limits on that authority.

3 With respect to the first question, we're
4 suggesting that where the Board intends to impose terms
5 and conditions of approval where the conditions
6 contradict current government policy, the question is
7 simply, first, that the policies must be relevant to
8 matters which may be adjudicated on by the
9 Environmental Assessment Board by virtue of the
10 Environmental Assessment Act. So the first question
11 is: Do you have this -- is it in the statute or is
12 there a limitation on the statute; and, secondly, the
13 policies must be relevant to the undertaking obviously
14 that is the subject of the environmental assessment.

15 With respect to the second question
16 whether the terms or conditions of the Board could
17 actually direct a change to policy, I simply added a
18 third question and, that is: As a practical matter, if
19 the Board is going to be directing an actual change to
20 policy, the policy must be within the control of the
21 proponent or within the authority of the proponent to
22 make.

23 The idea being there that if the term or
24 condition of approval in and of itself directed the
25 proponent to make a change in a policy, my suggestion

1 is that it would have to be -- the order would be
2 ineffective in a sense if the proponent didn't have the
3 authority itself to make that change. Now, I would
4 suggest that that really goes to the second class of
5 documents that you were talking about; that is, the
6 Ministry's own documents.

7 Now, I just make one further comment,
8 that in this submission we're not making any
9 distinction broadly between policies created by
10 Cabinet, by a Minister of the Crown or by other
11 administrative levels within the Ministry. Although
12 those distinctions can be drawn, it's our view that the
13 answer to the question about whether you can make a
14 decision that changes policy is not answered solely by
15 looking at at what level of authority that policy was
16 made, but that one has to look at it functionally.

17 THE CHAIRMAN: Ms. Murphy, is there a
18 distinction between the Board in granting an approval
19 indicating that if the proponent wishes to carry out an
20 activity they must do so in accordance with a
21 particular condition, which they may choose not to do,
22 and is there a difference between that and the Board
23 ordering the party to do something which contradicts a
24 policy and thus creates the possibility of a statutory
25 offence if they don't obey?

1 One is affirmatively directing a party to
2 do something; the other is indicating to the party that
3 if they wish to carry out a particular activity, then
4 they must do it in accordance with a certain condition
5 but they don't have to carry out that activity if they
6 choose not to? What I'm posing is that in both cases
7 there is a contravention implied of a current
8 government policy.

9 And again going back to the spray example
10 that I gave you, if the Board decided that based on the
11 evidence it made sense to spray chemical insecticides
12 as opposed to using BTs, it could formulate a policy in
13 terms of: If the Ministry is going to conduct any
14 maintenance activities, it shall not use BTs but shall
15 only use chemical insecticides, as an example.

16 MS. MURPHY: Mm-hmm.

17 THE CHAIRMAN: As opposed to the Board
18 directing the Ministry to use chemical insecticides
19 within a given area, both of which would have relevance
20 to the undertaking, both of which would have
21 environmental impacts and, consequently, would probably
22 be within the rubric or framework of its ability to
23 impose a condition of approval which, under the
24 Environmental Assessment Act, is contained in
25 unfettered language.

1 There's a difference. If you can see the
2 nuance I'm putting on it, there's an affirmative action
3 to the undertaking by a party, or there is an optional
4 action if they want to conduct an activity and, in both
5 cases, it would be a contravention of current
6 government policy.

7 I don't know if you've dealt with one of
8 those suggestions.

9 MS. MURPHY: Well, I understand the
10 distinction you're drawing. I'd make two comments.
11 First of all, as I understand the way one would apply
12 or approach this kind of analysis, you probably have
13 the jurisdiction to do either of those things, No. 1.

14 No. 2, I think that the thing that causes
15 me a little bit of concern today is that we're
16 discussing a matter of law that gets to be a little
17 esoteric if you're not dealing with something fairly
18 specific. And I would suggest to you that in
19 attempting to apply the analysis that would allow you
20 to determine, first of all, whether you have the
21 jurisdiction to make a particular kind of term and
22 condition, and then obviously going to the next
23 question, whether you should do it, the nuances of
24 every question are going to be fairly complex, they're
25 going to depend on the evidence that's before the

1 Board. And I think we could probably all stand here
2 and think about 37 examples and see how one would
3 approach it.

4 I would suggest on my understanding of
5 the evidence to date and on my understanding of how
6 this kind of analysis would be applied, you would
7 probably have the jurisdiction to do either of the
8 things you've suggested.

9 THE CHAIRMAN: Okay.

10 MS. MURPHY: And then there would be some
11 discussion clearly about whether, given the evidence,
12 you should do either or, if you should, which one you
13 should do.

14 THE CHAIRMAN: Well, presumably whatever
15 condition were imposed could be supported on the
16 evidence.

17 MS. MURPHY: That's right.

18 THE CHAIRMAN: That would be a given to
19 start with, I understand.

20 MS. MURPHY: Right. And, of course, then
21 the one thing in the analysis, with respect to the
22 example you've given, the one thing that you would be
23 thinking very carefully about is: Is it possible for
24 the proponent to do the thing you're ordering and, if
25 it is, then you could make that order. But I think

1 that's one of the things you would have to consider.

2 THE CHAIRMAN: Well, why wouldn't it be
3 possible in that example, for instance, for the
4 proponent to carry it out, even though there's a
5 specific Cabinet directive that says you can't?

6 MS. MURPHY: Well, in the example you're
7 giving you would have to, I would suggest, get to the
8 question of whether this is a directive of Cabinet or a
9 directive of the Minister. And if it's a directive of
10 the Minister, then clearly you can order the Minister
11 to change it, you could make an order to the Minister
12 to change the Minister's policy.

13 THE CHAIRMAN: What about if it's a
14 directive of Cabinet of which the Minister is a member?

15 MS. MURPHY: Right. If on the facts you
16 decided that the thing you were dealing with was a
17 directive of Cabinet, then I think you would have a
18 difficult time imposing a positive obligation on the
19 Minister of Natural Resources to change the policy of
20 Cabinet; you would probably have to approach it then
21 the other way and impose terms and conditions that --
22 well, perhaps of the other sort that you are discussing
23 or perhaps of other kinds. I mean, there are probably
24 various other options.

25

1 THE CHAIRMAN: By the way, I want it
2 clearly understood by all parties the Board is not
3 considering in any way at this stage what was mentioned
4 in the example. It is just that we are trying to come
5 up with an example based on the evidence to date that
6 would put this discussion in some kind of context.

7 MS. MURPHY: Yes. And again, as I say, I
8 am not answering it in that way either, I'm trying to
9 answer you by saying, given this example - and you
10 could properly give me others - how would this kind of
11 analysis apply, and all I can do is give you some
12 general ideas.

13 But, again, I don't think you are going
14 to be able to apply it until you have a specific fact
15 situation and a specific obviously request from some
16 person to impose a particular term and condition.

17 THE CHAIRMAN: Very well. Thank you.

18 Ms. Cronk?

19 MS. CRONK: Mr. Chairman, like Ms.
20 Murphy, we will try to make our submissions very brief.

21 We have had the opportunity of reviewing
22 the written outline that she has provided and
23 conceptually we agree that the issues can be approached
24 in the way that she suggests.

25 In our submission, the starting point in

1 this matter is with the Board's own jurisdiction under
2 the Environmental Assessment Act and we refer you in
3 that regard to subsection 12(2) of the Act which, of
4 course, as the Board knows, is the section invoked by
5 the Minister in referring this matter to the Board for
6 consideration. And you will recall that in Exhibit 1,
7 the actual notice before the Board, it is to subsection
8 12(2) that reference is made, and that notice from the
9 Minister indicates that the type of hearing to be held
10 by the Board is with respect to the acceptance of the
11 environmental assessment and the approval to proceed
12 with the undertaking.

13 I suggest that one is obliged to start
14 with subsection 12(2) because, of course -- sorry, sir.

15 THE CHAIRMAN: Excuse us one second.

16 ---Discussion off the record

17 THE CHAIRMAN: Okay. Go ahead.

18 MS. CRONK: Thank you. I suggest that
19 that is the appropriate place to start, Mr. Chairman,
20 because it is, of course, pursuant to that subsection
21 that the Board derives its jurisdiction to impose terms
22 and conditions as a condition to the approval of the
23 undertaking if the Board thinks that appropriate; and,
24 if such terms and conditions are to be imposed, the
25 Board's jurisdiction to provide exactly for the

1 appropriate terms and conditions is found in that
2 subsection, and I refer to subparagraph (e).

3 The other sections, however, of the Act
4 that in our submission are relevant are two. Section
5 20 which provides, as you will recall, that once the
6 decision of the Board in this matter becomes final
7 pursuant to Section 23 of the Act, it is deemed to be
8 the decision of the Minister.

9 Having recognized that effect caused by
10 the statute, one is then lead to consider subsection
11 16(1) which is the provision of the Act which prohibits
12 any person from proceeding with an undertaking contrary
13 to any term or condition imposed by the Minister in
14 giving approval to proceed with the undertaking.

15 So that we are then in the --

16 THE CHAIRMAN: That's just a deemed--

17 MS. CRONK: It is, sir.

18 THE CHAIRMAN: --effect of that.

19 MS. CRONK: It is, sir. So in our
20 submission, what we are suggesting is the dilemma that
21 the Board poses and upon which you've requested
22 assistance really is created by the interplay of those
23 three sections, and the jurisdiction and the duty of
24 the Board with respect to this hearing is that set out
25 under subsection (2) of Section 12 and that becomes

1 very important when one has regard to the exact
2 language of the decision of the Supreme Court of Canada
3 in the Innisfil case that Ms. Murphy has provided to
4 you.

5 And because she has given you the cases,
6 it may be of assistance to you, sir, if I simply
7 indicate the relevant portions which, in our
8 submission, you should have regard to.

9 If I could suggest that one must start
10 first with the decision of the Ontario Court of Appeal
11 in the Innisfil case.

12 THE CHAIRMAN: Just before we get to the
13 actual cases, Ms. Cronk, would it be your submission
14 under Section 14 of the Act, which sets out if the
15 Minister were applying terms and conditions, it seems
16 to indicate under 14(1)(b):

17 "Give approval to proceed with the
18 undertaking subject to such terms and
19 conditions as the Minister considers
20 necessary to carry out the purpose of
21 this Act and, in particular, requiring or
22 specifying..."

23 And then it goes through a number of
24 subsections that delineate some of the areas within
25 which the Minister could impose conditions, but there

1 is no such restriction placed upon the Board when it is
2 doing the same thing under Section 12(2).

3 Do you see any incongruity with those two
4 provisions?

5 MS. CRONK: I don't see any incongruity,
6 Mr. Chairman, but I do see significance. In my
7 submission, in accordance with the normal rules of
8 statutory interpretation, the fact that a delineated
9 list of subject matters that the Board can deal with in
10 imposing terms and conditions is not specified under
11 the statute, whereas it is in the case of the Minister,
12 signifies a clear legislative intent that the scope of
13 the terms and conditions which is open to the Board to
14 impose is broader.

15 And, in my submission, there is no other
16 clear supportable interpretation that one can draw from
17 that distinction.

18 THE CHAIRMAN: That would be the Board's
19 interpretation as well. So that we are essentially
20 unfettered--

21 MS. CRONK: That is our submission as
22 well, sir.

23 THE CHAIRMAN: --whereas the Minister
24 appears to have some delineation of his powers to
25 impose conditions.

1 MS. CRONK: There is clearly a
2 delineation of the types of terms and conditions which
3 the Minister can impose. As to whether that's a
4 restrictive list in the case of the Minister that, in
5 my submission, is irrelevant for the purposes today.
6 But certainly in the case of the Board, to the extent
7 that that is a restriction at all, it does not apply to
8 the Board.

9 THE CHAIRMAN: But then going in through
10 the back door; if we impose a condition, under Section
11 20 it is deemed to be the Minister's condition and
12 conceivably it could be a condition that he himself
13 could not impose necessarily.

14 MS. CRONK: Well, it is not deemed to be
15 the -- well, without intending in any way to appear to
16 be debating semantics, it is not deemed to be a
17 condition, a term and condition per se of the Minister,
18 but rather the overall decision is deemed to be that of
19 the Minister.

20 And, yes, it follows from the fact the
21 Board has the discretion and the jurisdiction to impose
22 terms and conditions beyond those that the Minister
23 could impose that, in effect, ultimately the Minister's
24 decision could encompass terms and conditions which in
25 the first instance perhaps the Minister could not have

1 imposed.

2 THE CHAIRMAN: Okay.

3 MS. CRONK: And there is logic to that,
4 in my submission, Mr. Chairman, apart from perhaps the
5 policy reasons for that being the case, when one
6 considers exactly the kind of issue that we are looking
7 at today, and that is the ability of a Board of this
8 kind, given your duties under the Act, to make
9 recommendations concerning existing government policy,
10 to impose terms and conditions that may require in an
11 affirmative or an indirect way changes to government
12 policy, because it will be our submission to you that
13 that's not restricted to policies of a particular
14 Minister but reflects a broader base of policy matters.

15 What I am suggesting to you is it may be
16 quite different for a Minister to seek to do that via
17 terms and conditions than it is for this Board,
18 depending on the nature of the policy.

19 So there may be very practical reasons
20 why the scope of the Board's jurisdiction is larger in
21 that sense as well.

22 THE CHAIRMAN: Okay. Thank you. Let's
23 move on to the cases.

24 MS. CRONK: All right. With respect to
25 the Court of Appeal decision. Then first, Mr.

1 Chairman, if I could refer you to page 157 simply so
2 that the Board has what, in our submission, are the
3 relevant passages before it. At page 157 it was made
4 clear by the Court of Appeal that the basic issue in
5 this case --

6 THE CHAIRMAN: Is that not the Supreme
7 Court case you are referring to?

8 MS. CRONK: I am referring first to the
9 Court of Appeal decision.

10 THE CHAIRMAN: That's in the 300s; is it,
11 pages?

12 MS. CRONK: Oh, sorry. My copies appear
13 to be different. Excuse me.

14 Ms. Murphy says she is using the right
15 citation, right series, it is the Ontario Municipal
16 Board Reports. But be that as it may...

17 MS. MURPHY: You're using...

18 MS. CRONK: I'm using... Thank you.
19 Perhaps, sir, I could just read it to you and I can
20 find the comparable pages for you later and provide
21 them to you at the end of the day.

22 But the relevant passage from the Court
23 of Appeal decision to which I was about to refer
24 indicates and confirms that the main issue before the
25 Divisional Court in the Innisfil case was whether the

1 Board, the Ontario Muncipal Board had been correct in
2 finding that it was bound by a statement of government
3 policy on a particular issue that was relevant to the
4 matter before it. The particular issue was population
5 forecast and projections. And there was a subsidiary
6 but very much related issue; and, that was, the Board
7 having indicated to the parties that they felt they
8 were bound by the expression of government policy on
9 the population issue, were the parties entitled to
10 cross-examine on the policy and to lead evidence
11 relating to it, and the Board ruled that they were not
12 so entitled.

13 It was those two issues that went first
14 to the Divisional Court, from there to the Court of
15 Appeal and ultimately to the Supreme Court of Canada.

16 The Court of Appeal in dealing with the
17 first issue; that is, whether or not the Board was
18 correct in indicating that it was bound by the
19 expression of ministerial policy, confirmed the
20 decision of the Divisional Court that in fact that was
21 not the case. And their reasoning - and, again, I will
22 find you the appropriate page - it appears to be
23 starting at page 400 over to 401 of the report that you
24 have, was as follows:

25 "I agree with...Mr. Justice...Robins in

1 his reasons delivered on the judicial
2 review application that 'having regard to
3 its statutory mandate, the Board clearly
4 was not in law bound by the policy
5 statement'..."

6 In other words, the Board did have a
7 discretion whether to adopt and how best to implement
8 government policy in the area of population. This is
9 not to say that the Board would be wrong in feeling
10 obliged at a later stage to follow government policy,
11 particularly when dealing with a specific policy as
12 stated in this case in contrast to a general policy.

13 And that, Mr. Cassidy informs me, is
14 found at page 401 of the version of the case that you
15 have before you.

16 So on the issue generally then of whether
17 an expression of ministerial policy was binding, the
18 Court of Appeal held that it was not.

19 On the issue of the rights to
20 cross-examine, the Court of Appeal held that there were
21 not, in the circumstances of that case, necessarily
22 those rights.

23 When the matter came up before the
24 Supreme Court of Canada, the emphasis was particularly
25 on the right to cross-examine on the document that

1 reflected ministerial policy. The Supreme Court of
2 Canada was not required to directly address the issue
3 of whether government policy was binding on the Board,
4 but the issue, in our submission, was so inextricably
5 linked with the procedural rights that were at issue
6 that the court made several pronouncements which, in
7 our submission, are not only of significance and will
8 be of assistance to you but, in effect, the resolution
9 of the issue.

10 And, again --

11 THE CHAIRMAN: I haven't read this case
12 in several months, but is there any distinction made in
13 the Court of Appeal decision with respect to
14 ministerial policy and any other policy?

15 MS. CRONK: No, sir. There was not a
16 discussion, for example, of different forms of
17 government policy. What was being discussed
18 particularly was a letter in which a particular
19 minister had indicated that a certain policy had been
20 approved by the government.

21 So there was not, for example, the type
22 of discussion that one might today wish for the
23 purposes of this matter to have been held with respect
24 to guidelines versus Cabinet-approved versus
25 ministerial press releases; there is not that kind of

1 discussion in the case.

2 THE CHAIRMAN: Okay.

3 MS. CRONK: There is, however, mention of
4 that concept in the Supreme Court of Canada decision
5 which, in our submission, will be of assistance to you.

6 Again, sir, I don't know which series
7 copy you have of the Supreme Court of Canada decision
8 and I will find the appropriate pages in the version
9 that you have. I am dealing with the copy from the --
10 excuse me just a moment.

11 ---Discussion off the record

12 Again, we have different ones, so I will
13 find the page numbers for you.

14 THE CHAIRMAN: Okay.

15 MS. CRONK: In our submission, the
16 relevance and value of this case to the issue that we
17 are discussing today is really threefold.

18 First, the court dealt, in our
19 submission, quite directly in the context of dealing
20 with the right to cross-examine on government policy
21 with the issue of whether such policy is binding; and,
22 secondly, it, in our view, laid down in very clear
23 terms what is required in order for government policy
24 to be binding upon a tribunal, and in the course of its
25 reasons the court made the following statement, first,

1 and I will provide the page to you subsequently, sir:

2 "If on its face an agency is held out in
3 the constituting legislation as
4 'independent' of the executive, that is
5 with functions independent of the
6 executive branch, it remains that way for
7 all purposes until the Legislature
8 exercises its undoubted right to alter,
9 by providing for policy directions for
10 example, the position and procedure of
11 the agency."

12 Continuing in the same discussion on the
13 next page, the Supreme Court indicated:

14 "A Court will require the clear statutory
15 direction along the lines, for example,
16 of the Broadcasting Act to enable the
17 executive branch of Government to give
18 binding policy directions to an
19 administrative tribunal and to make such
20 directions immune from challenge by
21 cross-examination or otherwise by the
22 objectors."

23 In our submission, Mr. Chairman, Members
24 of the Board, that direction makes it very clear that
25 in the absence of a clear statutory provision

1 stipulating that a particular government policy or
2 policies are to be binding, such policies are not
3 binding upon an administrative tribunal so long as the
4 policies are related to matters at issue before the
5 tribunal and come within the scope of its adjudicative
6 function.

7 And that, of course, is what Ms. Murphy
8 was referring to when she suggested that one of the
9 limitations on the jurisdiction of the Board was that
10 it be related to matters relevant to the hearing which
11 you are obliged to hold under the Act.

12 And you will recall that I suggested
13 earlier, Mr. Chairman, that the duty of the Board under
14 subsection 12(2) of the Environmental Assessment Act
15 was the starting point and that is because the Supreme
16 Court of Canada specifically addressed what the
17 function of the tribunal was, what the scope of its
18 duty was in the context of determining whether or not
19 it was bound by government policy.

20 The court also indicated -- excuse me,
21 Mr. Chairman.

22 The passages I have just read to you, Mr.
23 Cassidy informs me, are at pages 150 and 151 of the
24 version of the case that you have.

25 The court also indicated in general

1 terms, however, the import of various forms of
2 government policy. And, again, I will have to find the
3 pages for you in your copy, but the quote that I wish
4 to read is as follows, from page 164 of the Supreme
5 Court Reports version of the case.

6 The court embarked on a consideration of
7 the jurisdiction of the Board by looking at the
8 legislation which created the Board, by examining
9 specifically the type of hearing that the Board was
10 required to hold, and then the court went on to say
11 this, having gone through that exercise:

12 "The effect of all these provisions is to
13 leave the Board with the duty to dispose
14 of the annexation issue 'upon such terms
15 as it may consider expedient' without any
16 directives, statutory standards or
17 guidelines, and without any right in the
18 executive branch of Government to limit
19 the Board by Order-in-Council,
20 regulation, directive or otherwise, such
21 as appear, for example, in the
22 Broadcasting Act. The Board may order
23 the annexation of more or less land than
24 proposed by the applicant or none at all.
25 The Legislature has assigned to the Board

1 the unlimited duty to hold a public
2 hearing, enquire into the merits of
3 the application and the objections, and
4 thereafter to dispose of the annexation
5 application on the merits as determined
6 by the Board. That is the position of
7 the Board under these statutes."

8 And stopping there, Mr. Chairman, by
9 analogy it will be our submission that that is
10 precisely the position of this Board with respect to
11 the duty to hold a hearing.

12 And Mr. Cassidy informs me that that
13 passage is at page 144 of the version of the case that
14 you have before you.

15 Continuing on to the next page, the court
16 indicated as follows:

17 "The position accorded to the citizens of
18 the community by the Legislature under
19 the same statutes is the absolute and
20 unqualified right to object to the
21 application being granted in whole or in
22 part. There is nothing in the statute
23 which might be construed as authorizing
24 the Board, the Minister or the Court to
25 curtail the right of the people to bring

1 'any objections' that any person may
2 desire to bring to the attention of the
3 Board."

4 Then the following passage, Mr. Chairman,
5 is in our submission relevant:

6 "More specifically, there is nothing in
7 these statutes to afford members of the
8 executive, the Executive Council or any
9 other agency of state, a position
10 superior in any way to the position of
11 the appellant and the other objectors.

12 The statute, for example, does not make
13 the Board duty-bound to receive..." in
14 this case, the letter setting out the ministerial
15 policy which the Board had in fact received.

16 Now, in our submission, that enunciation
17 of the law by the Supreme Court of Canada means simply
18 this: That there is an obligation upon this Board in
19 the context of its statutory duty to hold a hearing to
20 consider relevant government policy; secondly, that
21 relevant government policy is not binding on this Board
22 unless a clear statutory direction to that effect
23 exists and, in our submission, that is not the case
24 here.

25 Now, what is meant by a clear statutory

1 direction, Mr. Chairman, there are a number of examples
2 at the provincial level and a number at the federal
3 level. Perhaps the one that most will be familiar with
4 is the amendments introduced to the Planning Act in
5 1983 which provided expressly for the ability of a
6 minister of the Crown in relation to planning matters
7 of a provincial interest to enunciate government
8 policy.

9 Pursuant to Section 3 of that statute as
10 amended, once a policy of that kind; that is, a policy
11 of provincial interest related in that case to a land
12 planning matter, is articulated, it is published in a
13 certain way, including in the Gazette, and the statute
14 then in mandatory terms requires every tribunal who has
15 a matter before it relevant to the matters covered by
16 the policy to take into account that policy. That is
17 an example of the type of statutory direction that can
18 be introduced.

19 THE CHAIRMAN: Not to take into account
20 the policy, but to follow it?

21 MS. CRONK: Precisely, sir.

22 THE CHAIRMAN: All right.

23 MS. CRONK: The language actually is to
24 have regard to such policy statements, but the case law
25 has made it clear that that is tantamount and is

1 intended to mean it's binding policy.

2 The distinction I am drawing is that in
3 respect of all of the policy documents of whatever kind
4 that have to date in the evidence been drawn to your
5 attention, none are subject to a statutory policy
6 direction of that kind insofar as I am aware.

7 It is submitted, therefore, that this
8 Board is in a position analogous to the Board in the
9 Innisfil case to the extent that one then examines the
10 duty of this Board to hold a hearing under subsection
11 (2) of Section 12, that one then acknowledges that
12 government policy while relevant is not binding, that
13 there is an obligation to consider it, but that in
14 accordance with the Supreme Court of Canada the Board
15 is not bound to accept and to adhere to the government
16 policy in whatever form it might be simply because it
17 is government policy.

18 And if I could adopt the language of the
19 Supreme Court of Canada in that regard, it simply means
20 that this Board has a duty to hold a hearing with
21 respect to the matters set out in Exhibit 1 without any
22 directives, statutory standards or guidelines and
23 without any right in the executive branch of the
24 government to limit the Board by Order-in-Council,
25 regulation, directive or otherwise, save as may be

1 directed by statute which has not happened in this
2 case.

3 We submit in essence, Mr. Chairman, that
4 that is a correct enunciation of the law with respect
5 to all government policy.

6 Further, whether it is Cabinet-approved
7 or otherwise it includes, in our respectful submission,
8 Ministerial policy statements, Cabinet-approved
9 policies, guidelines and guides of any kind - in this
10 case the Class Environmental Assessment Document - and
11 there is of course authority to amend that in a
12 different category.

13 THE CHAIRMAN: Well, that in itself has
14 specific statutory authority for amendment under the EA
15 Act.

16 MS. CRONK: Exactly, and any technical
17 directives emanating from a government source that are
18 relevant to the matters before you. The Board also
19 raised the issue of ground rules and whether that form
20 of documentation, to the extent that it might be argued
21 it reflected government policy, was binding upon the
22 Board. In our submission, clearly they are not binding
23 upon the Board.

24 But the situation is slightly different;
25 and, that is, the evidence before you is that those

1 ground rules form part of a matter of private contract
2 between the government and other parties, they are
3 incorporated in and are part of a formal contractual
4 agreement. To the extent then that existing ground
5 rules are before you for consideration, in our
6 submission, it would be most problematic to suggest
7 retroactively that any amendment of existing
8 contractually imposed ground rules should be made.

9 Having said that, as a jurisdictional
10 matter that doesn't prevent the Board from addressing
11 the matter of future ground rules or the appropriate
12 contents of future ground rules. You're simply moving
13 in to a different area of the law when you start
14 talking about matters of private contract.

15 In our submission, an appropriate
16 expression of the manner in which to apply all of these
17 principles has in fact been set out by a Joint Board
18 constituted under the Consolidated Hearings Act, and
19 I'm referring to the Ontario Hydro case, and I'd like
20 to provide you with a copy of that case and the
21 relevant passages are at pages 269 to 270.

22 (handed)

23 THE CHAIRMAN: Thank you.

24 MS. CRONK: In that case, Mr. Chairman,
25 commencing at page 269, the Joint Board specifically

1 was called upon to consider the impact and significance
2 of government policy as it related to the matters at
3 issue before it. This was a decision in a case that
4 arose after the decision in the Innisfil case, and I
5 would refer to the entire section of the Joint Board's
6 decision dealing with government policy in which, in
7 our submission, it is simply confirmed that the Board
8 could decide to be bound by government policy or,
9 alternatively, it could conclude that other
10 considerations have a greater influence on the
11 determination of any particular issue. And I'm quoting
12 now from the concluding sentence of the first full
13 paragraph under section (b) on page 269. The Joint
14 Board recognized in that case that:

15 "Government policy unless..." leaving
16 aside always the exception with respect to statutory,
17 assuming that that is not the case - and it's not the
18 case here - that:

19 "Government policy...is not binding but
20 that it is to be considered and that the
21 Board, in appropriate circumstances on
22 all the evidence before it, could come to
23 conclusions different from those
24 evidenced by the government policy."

25 So I provide that, sir, simply as an

1 example of the type of consideration that has applied
2 in the past.

3 There are two aspects particularly of Ms.
4 Murphy's written submissions that I would like to
5 briefly address. Mr. Chairman, the first is set out in
6 paragraph 6 of those submissions in the argument
7 section. In paragraph 6 Ms. Murphy urges that in all
8 cases the Board must consider the policies, that being
9 government policies, before arriving at a decision and
10 if a specific policy is to be contradicted or if a
11 change is to be required, the Board must give reasons
12 for the decision to do so. We simply wish to endorse
13 and support with particular emphasis that submission.

14 There is at the moment a case pending
15 before the Divisional Court in which it has been
16 alleged that a tribunal failed to consider relevant
17 government policy and, further, that it reached a
18 decision which contradicted implicitly existing
19 government policy and that it did so without reasons,
20 and the argument to go before the court early in the
21 new year is that that constituted a breach of natural
22 justice.

23 Whether that be correct legally or not,
24 the fact that the argument can be made suggests that
25 there are procedural mechanisms that should be

1 considered in this whole area of dealing with
2 government policy and they are simply these: That it
3 must be clear on the face of the Board's decision that
4 relevant government policy has been considered; if it
5 is to be contradicted or departed from or if a change
6 in it is to be suggested by virtue of the terms and
7 conditions imposed by the Board, then the reasons for
8 so doing should be clearly articulated in the Board's
9 decision, and we --

10 THE CHAIRMAN: And are you suggesting
11 that the Board must go beyond saying it has considered
12 the policy in question and it does not agree?

13 MS. CRONK: It may well be, sir, that
14 once you've heard all the evidence in this case there
15 will be specific findings of fact that will bear on the
16 issues to which the policy relates and those findings
17 of fact would support such a conclusion by the Board,
18 And it may well be that that would be the appropriate
19 way to approach it.

20 I cannot suggest at this point, without
21 knowing what policy we're talking about, whether a
22 conclusion without more would be a sufficient
23 satisfaction of the requirement to give reasons, but I
24 could envisage that that might easily not be the case.

25 There is one other aspect of Ms. Murphy's

1 written submissions which I would wish to address
2 briefly as well; that is, the submissions contained in
3 subparagraph (3) of paragraph 5, this is:

4 "In a situation where it is intended that
5 the conditions to be imposed by the Board
6 would require a change in current
7 government policy, it is suggested that
8 one of the limitations in practical terms
9 is that the policies which are to be
10 ordered changed pursuant to the mechanism
11 of terms and conditions must be within
12 the control of the proponent or within
13 the authority of the proponent to make."

14 And that submission is repeated in
15 paragraph 10 of the argument section of her written
16 submissions as well.

17 And our submission on that, Mr. Chairman,
18 is simply this: Because the discretion of the Board is
19 not fettered in any way with respect to any particular
20 type of government policy, it seems to us that there
21 are a number of options open to the Board.

22 First, that it could recommend changes to
23 existing government policy in whatever form it takes;
24 secondly, that it could impose terms and conditions
25 which are designed to require changes either expressly

1 or in effect; and, in our respectful submission, on a
2 practical level, Ms. Murphy is correct that in order to
3 ensure the enforceability of the Board's terms and
4 conditions it is, in practical terms, desirable that
5 those be policies of the proponent or policies over
6 which the proponent has control, but in legal terms
7 your jurisdiction is not so confined in our submission.

8 And the example that I can give you, sir,
9 is this: If it is a policy document that emanates
10 solely from hypothetically the Minister of Natural
11 Resources that is clearly a policy document which it
12 would be within the control of the Minister of Natural
13 Resources to change and, in a derivative sense, thus
14 the proponent. If, however, it's a policy statement
15 that emanates from Cabinet, or it is suggested to you
16 that there is that level of status attaching to the
17 document, that implies that it has the authority or the
18 approval of ministries in addition to the Ministry of
19 Natural Resources. In those circumstances, in our
20 submission, the options which I have suggested to you
21 are open to the Board but under the characterization of
22 the limitations suggested by Ms. Murphy, that is not a
23 policy that is solely and completely within the control
24 of the Minister of Natural Resources to change, so that
25 what one would then want to consider the language of

1 how the Board went about suggesting a change.

2 Her point is well taken, Mr. Chairman,
3 that the Ministry could not be required by affirmative
4 language to change that policy when it's clearly beyond
5 purely that ministry's jurisdiction. Having said that,
6 clearly a change in the policy can be recommended or
7 required by the Board.

8 THE CHAIRMAN: All right. What about the
9 proposition that a condition of approval apply to any
10 party before the Board in connection with this
11 application?

12 And by that I mean, for instance - again,
13 just to use examples - for instance, ONAD appeared
14 before the Board, and there may be policy directives or
15 policy in connection with some of the evidence given by
16 the witnesses called for on behalf of ONAD to explain
17 how some of their policies impact upon other policies
18 of MNR; now, would the Board under the argument you've
19 just given also have the ability to contradict policy
20 of any party that was before the Board other than the
21 Minister of Natural Resources or the Ministry --

22 MS. CRONK: Government policy?

23 THE CHAIRMAN: Government policy, because
24 it's another ministry that is also before the Board.
25 For example, the Ministry of the Environment is also

1 before the Board.

2 MS. CRONK: Mm-hmm.

3 THE CHAIRMAN: The Ministry of the
4 Environment may have policy directions in terms of
5 water quality or anything else.

6 MS. CRONK: Mm-hmm.

7 THE CHAIRMAN: Why can't the Board impose
8 any kind of condition in an unfettered manner against
9 any party which is before it if that other party has
10 the ability to carry out that direction?

11 MS. CRONK: The jurisdictional difficulty
12 in doing that, Mr. Chairman, is that if it is a policy
13 of an agency, other than the proponent in this case, it
14 is likely that all evidence bearing upon the relevance
15 of the policy, the rationale of the policy, the public
16 policy reasons for its introduction may well not be
17 before you; that is, the usual circumstance in cases of
18 this kind, so that to in effect in a term and condition
19 require a change to government policy that does not
20 pertain to the Ministry of Natural Resources, I would
21 suggest, except in unusual circumstances, would usually
22 be a finding made on scant evidence.

23 So that the way that it has been
24 approached in prior cases with which I'm familiar is
25 that because the Board's duty is to consider the

1 proponent's undertaking and to accept, amend, reject or
2 approve that undertaking, then only insofar as the
3 activities proposed by the proponent relate to or are
4 affected by other policy, should a term and condition
5 be seen to affect other agencies' policy.

6 THE CHAIRMAN: I agree with you with the
7 exception perhaps of the Ministry of the Environment,
8 because the Ministry of the Environment is also
9 involved in some regulatory aspects of this
10 undertaking.

11 MS. CRONK: I understand, sir.

12 THE CHAIRMAN: And the Ministry is a
13 full-time party before the Board and it may well be at
14 the end of the day that the Board may take issue with
15 the manner in which the Ministry of the Environment has
16 indicated they would propose to regulate some activity
17 of the Ministry of Natural Resources pursuant to their
18 undertaking before the Board.

19 And if that were the case, it wouldn't
20 serve much of a purpose for the Board to approve
21 something in a manner in which the ultimate regulatory
22 authority, after the Board's decision, would not carry
23 it out in accordance with the way the Board thought
24 that regulation should occur.

25 MS. CRONK: I understand the issue quite

1 clearly, sir, because of the role...

2 THE CHAIRMAN: It's a little different
3 than the normal case where somebody comes in from
4 another agency and puts forward what their concerns
5 might be but does not have a regulatory presence or
6 power subsequent to the issuance of the Board's
7 decision.

8 MS. CRONK: But the best example that I
9 can give you, sir, is that it's not at all unusual in
10 hearings of this kind for the policies, a particular
11 policy or guidelines of the Ministry of the
12 Environment, the Ministry of Natural Resources to be
13 relevant to the matters before the Board when they're
14 not the proponent. That's quite comon.

15 And what I'm suggesting is that if a
16 change to that type of policy, another governmental
17 agency policy is considered at the end of the day
18 appropriate by the Board, there are two things to be
19 taken into account. The first is the evidentiary base
20 that you have on which to form that conclusion because
21 very often that will be insufficient; not always, but
22 often.

23 THE CHAIRMAN: And I think the Board, if
24 it were intending to go that route, would specifically
25 request for instance the Ministry of the Environment to

1 articulate the policy in terms of exercising their
2 regulatory power fully so that the Board could consider
3 it and at that point, if it wanted to impose a
4 condition relative to an approval of the undertaking,
5 could take that into account.

6 MS. CRONK: And secondly, and perhaps
7 more importantly, sir, what I'm suggesting is that the
8 second consideration to be taken into account is
9 whether that form of a conclusion, a decision, should
10 find its way into a term and condition which is, in
11 essence, directed to the proponent or whether it should
12 form or be characterized as a recommendation in the
13 body of the decision, and there is a material
14 difference.

15 I started these submissions by saying
16 that there were a number of options available to the
17 Board; the first was that it could make recommendations
18 as to change; that it could, secondly, impose terms and
19 conditions which are designed expressly or in effect to
20 require a change, but recognizing that the terms and
21 conditions are directed to the proponent whose
22 undertaking it is.

23 So that there are some inter-related
24 concepts. The first is the evidentiary base; and,
25 secondly, whether that is a matter that is appropriate

1 for a term and condition, it may well not be.

2 THE CHAIRMAN: Is that the manner in
3 which you purport that the Board would direct for
4 instance your clients' future conduct on say an FMA
5 unit would occur, through the Ministry?

6 MS. CRONK: In effect, sir, the terms and
7 conditions that apply to the conduct of timber
8 management activities, recognizing that the proponent
9 has the responsibility for that management function --

10 THE CHAIRMAN: And recognizing that your
11 clients on FMA units carry it out.

12 MS. CRONK: Yes. That any terms and
13 conditions that directly affect timber management
14 activities imposed on the Ministry have that indirect
15 effect on the Industry to the extent that they wish to
16 continue to participate in those activities with the
17 Ministry.

18 THE CHAIRMAN: And are you saying that we
19 would not be entitled to impose a condition directly on
20 the Industry if they were going to participate on a
21 Crown unit?

22 MS. CRONK: Yes, sir, I am. I'm saying
23 you can't impose a term and condition directly on --

24 THE CHAIRMAN: We can or can't, sorry?

25 MS. CRONK: Cannot.

1 THE CHAIRMAN: Cannot.

2 MS. CRONK: Cannot impose a term and
3 condition directly on a party who does not have an
4 undertaking -- a proposal before you, which is the same
5 point I was making with respect to the Ministry of the
6 Environment.

7 What I'm suggesting is, is that at the
8 end of the day you will have heard a great deal of
9 relevant evidence on matters related generally to
10 timber management activities, and you would be free in
11 your decision to make recommendations, very wide-spread
12 or very wide in scope as to how you think those
13 activities should be conducted in the future, but Ms.
14 Murphy is correct that in practical terms the
15 undertaking and the hearing that you're required to
16 hold is that related to the Ministry of Natural
17 Resources' undertaking as determined by the notice
18 before you. And all I'm --

19 THE CHAIRMAN: Would it take the form,
20 for instance - I'm sorry, I just want to pursue this
21 just to get it straight - would it take the form of the
22 Board saying that in the event that the Ministry wishes
23 to enter into, for instance, future FMA agreements it
24 shall do so upon the following basis, if there were a
25 provision that the Board wanted to ensure would appear

1 in future FMA agreements, realizing that it's the
2 Industry that carries out the activity on FMA units?

3 MS. CRONK: In our submission, sir, that
4 is within your jurisdiction.

5 THE CHAIRMAN: To impose that kind of
6 condition--

7 MS. CRONK: Absolutely.

8 THE CHAIRMAN: --if the Ministry wishes
9 to enter into that kind of agreement?

10 MS. CRONK: Absolutely.

11 THE CHAIRMAN: But we wouldn't be able to
12 impose it directly on the Industry?

13 MS. CRONK: That's correct, sir.

14 THE CHAIRMAN: We would go through the
15 Ministry pursuant to their undertaking?

16 MS. CRONK: That's right. And leaving
17 aside entirely whether, on the particular issue, that
18 should be done--

19 THE CHAIRMAN: Yes.

20 S. CRONK: --technically. As a matter of
21 jurisdiction, yes, sir, because it is the Ministry who
22 is responsible for managing timber management on Crown
23 lands, absolutely. That is in effect how the policies
24 of the Ministry of the Environment become relevant
25 before you.

1 MS. MURPHY: Not to interrupt, but if I
2 might bring your attention to the Environmental
3 Assessment Act, Section 16, which may have an effect on
4 the question you just raised with respect to the effect
5 of approval. That section sets out that:

6 "No person shall proceed with an
7 undertaking contrary to any term or
8 condition imposed by the Minister..."

9 And, of course, this also applies to
10 yours:

11 "...in giving approval to proceed with
12 the undertaking."

13 It's the next section I would draw your
14 attention to:

15 "No person shall give any licence that is
16 required in order to proceed with an
17 undertaking contrary to any term and
18 condition imposed by the Minister in
19 giving approval to proceed with the
20 undertaking."

21 I would suggest it's that section that
22 applies in this case where you are imposing in the
23 Ministry of Natural Resources terms and conditions of
24 approval. This section then says: "no licence" -
25 which, as you have put it, an FMA agreement is - may be

1 given that contravenes those terms and conditions. I
2 think that's the point there.

3 THE CHAIRMAN: Okay.

4 MS. MURPHY: Sorry.

5 MS. CRONK: I'm grateful to my friend,
6 Mr. Chairman, and those are my submissions.

7 THE CHAIRMAN: Thank you, Ms. Cronk.

8 Okay. We would like to hear from the
9 other parties. Without repeating much of the case law,
10 if we don't have to, could we ask the remainder of the
11 parties if they have anything further to add or if they
12 want to approach these issues from a different
13 perspective.

14 Mr. Lindgren?

15 MR. LINDGREN: Yes, sir.

16 Mr. Chairman, as you do know the issue
17 before the Board has been framed in the following way
18 and, that is: Does the Environmental Assessment Board
19 have the authority to impose terms and conditions that
20 order or require amendments to material such as
21 government policies, guidelines and manuals. And it is
22 clearly our position that the answer is yes, and in
23 this sense we agree with some of the submissions made
24 by Ms. Murphy and Ms. Cronk earlier.

25 In light of the hour and in light of Ms.

1 Murphy's suggestion that perhaps this matter be dealt
2 with further next week, it's not my intention to go
3 through the rather detailed submissions that we have
4 prepared on this issue. However, it may be advisable
5 or perhaps desirable for the Board and for the other
6 parties to have me give a rough overview or outline of
7 what those submissions will be.

8 THE CHAIRMAN: Are those submissions in
9 writing at all?

10 MR. LINDGREN: Not at this point.

11 THE CHAIRMAN: Okay.

12 MR. LINDGREN: In support of our
13 position, Mr. Chairman, we are intending to make five
14 submissions. The first is that the broad language of
15 Section 12(2) and 14 of the Environmental Assessment
16 Act provides the Board with sweeping powers to impose a
17 variety of terms and conditions that are consistent
18 with the purpose of the Act as set out in Section 2.

19 It's our submission, Mr. Chairman, that
20 the Board must have regard to both Section 12(2) and
21 Section 14 and the purpose of the Act as set out in
22 Section 2.

23 THE CHAIRMAN: Are you suggesting that
24 the Board must take into account the provisions of
25 Section 14?

1 MR. LINDGREN: Mr. Chairman, I agree with
2 Ms. Cronk's suggestion that the logical starting point
3 for this inquiry is Section 12(2); however, I think
4 that the Board must and should have regard to the
5 provisions of Section 14.

6 Section 14, of course, speaks expressly
7 to the Minister's powers in terms of imposing terms and
8 conditions; however, in our submission, when the
9 Minister has referred an environmental assessment to
10 the Board under Section 12(2), the Board effectively
11 does enjoy the same powers and duties as the Minister
12 has under Section 14. In other words, under Section
13 12(2), the Board is acting as the alter ego of the
14 Minister.

15 THE CHAIRMAN: Well, with respect, Mr.
16 Lindgren, I'm not sure the Board agrees with that
17 submission. The problem is in the wording:

18 "Where the Minister has accepted an
19 environmental assessment..."

20 In this case, the Board has not accepted
21 an environmental assessment until at least the end of
22 the hearing, and there is some doubt, for instance,
23 whether the Board would have the jurisdiction to issue
24 an order under, say, 14(1)(b)(iii) to order further
25 research or investigation.

1 As you're probably aware, the Minister
2 has the power, I think under Section 11, to order
3 further studies; I'm not sure the Board has the same
4 powers, its powers might be limited to either accepting
5 the environmental assessment or accepting the
6 assessment with amendment, but not necessarily to stop
7 midway and say: We don't think you've done enough, in
8 effect issuing a Section 11 type order. And I don't
9 think you can just apply Section 14 and say the Board
10 is in the alter ego of the Minister when it comes to
11 applying those subsections.

12 MR. LINDGREN: My suggestion, Mr.
13 Chairman, is that Section 14 does not apply in its
14 entirety. What I was attempting to get at is that the
15 list of the possible terms and conditions that could be
16 imposed under Section 14 are perhaps illustrative of
17 the types of terms and conditions that could be imposed
18 by the Board under Section 12(2).

19 As you know, Mr. Chairman, under Section
20 12(2) there is no express qualification or in fact
21 implied limitation on the right of the Board to impose
22 terms and conditions that it determines are necessary
23 or appropriate. So, for example, if the Board does
24 determine that it is necessary or appropriate to carry
25 out some form of further research or monitoring work,

1 it is clearly within the jurisdiction of the Board to
2 make such an order.

3 THE CHAIRMAN: Well, again, I just ask
4 you to consider the sequence of events, and it appears
5 that the way you interpret the Act, or at least the
6 possible interpretation of the Act is, is that the
7 Board has to come to the decision firstly as to whether
8 or not it accepts the assessment. If it does, it could
9 impose terms and conditions or presumably it could
10 accept the assessment with no terms and conditions, it
11 has that flexibility.

12 But whether the Board has the
13 jurisdiction to impose any terms and conditions prior
14 to accepting the assessment I think is up for debate.

15 MR. LINDGREN: I don't think that's the
16 issue here, sir. I'm not disagreeing with the comments
17 that you just made. I was operating on the premise
18 that the Board has accepted the environmental
19 assessment: What does it do now, what powers does it
20 have to impose terms and conditions.

21 It's my submission that those --

22 THE CHAIRMAN: Well, if you're saying at
23 the end of the day, if the Board accepted the
24 assessment and then said: Prior to carrying out an
25 undertaking or an activity you shall complete a certain

1 study or something like that, that's clear, the Board
2 can do that.

3 MR. LINDGREN: That was my intention.
4 That was the submission I was intending to make and I
5 apologize for any misunderstanding that has arisen. In
6 any event, Mr. Chairman, that was my first submission.

7 The second submission is that the
8 Divisional Court decision in the Ontario Hydro Eastern
9 Transmission case has confirmed that the Board does
10 enjoy extremely broad powers to impose terms and
11 conditions under Section 12(2). This case has not been
12 distributed to you previously. I would certainly like
13 to distribute it to the Board and to the parties at
14 this time.

15 THE CHAIRMAN: This is the Divisional
16 Court one or the Court of Appeal one?

17 MR. LINDGREN: I have attached both
18 decisions, sir.

19 MR. HUFF: (handed)

20 THE CHAIRMAN: The Divisional Court has
21 been busy in this area the last little while, mainly
22 Joint Board matters obviously.

23 MR. LINDGREN: Mr. Chairman, the most
24 relevant portion of this decision is found at page 74
25 which is the Divisional Court decision.

1 I would like to draw the Board's
2 attention to the first full paragraph on that page
3 where the Court indicates in the second line:

4 "The Board is given broad powers under
5 Section 12(2)(e) of the Environmental
6 Assessment Act to approve the undertaking
7 subject to terms and conditions. We are
8 of the opinion that those powers permit
9 the Board to attach as a condition to its
10 approval of the undertaking the
11 acceptance of Hydro of any of the methods
12 of carrying out the undertaking
13 originally identified by Hydro."

14 And the Court goes on:

15 "Indeed, it could attach as a condition
16 of its approval the adoption by Hydro of
17 a method of carrying out the undertaking
18 never previously considered by Hydro.
19 Hydro's option would then be to accept or
20 decline the approval as qualified by the
21 Board."

22 And skipping the next line to the final
23 sentence:

24 "To hold otherwise would diminish the
25 power of the Board to approve

1 undertakings and curtail the utility of
2 submissions by interested participants in
3 the hearing."

4 And I think this is relevant to the
5 concern you raised earlier with Ms. Murphy. You asked
6 whether or not the Board would have the jurisdiction to
7 impose a term or condition that either required
8 affirmative action or put the Ministry to its choice if
9 they wanted to carry out the undertaking.

10 And I think this particular provision
11 answers that question. If the Board imposes a term or
12 condition that effectively gives the Ministry an
13 option, the Ministry - as Hydro did in this case -
14 would be put to a choice of either accepting or
15 declining approval as qualified by this Board.

16 THE CHAIRMAN: And that's as far as it
17 goes; is that your submission?

18 MR. LINDGREN: That's correct. I do have
19 some other comments about the significance of this
20 case, Mr. Chairman, but I think I will reserve on them
21 until this matter is dealt with again.

22 The third submission that we intended to
23 make was that, in our view, it is instructive to look
24 at some of the terms and conditions that have been
25 imposed by the Environmental Assessment Board and the

1 Joint Board in previous decisions as some of these
2 decisions confirm that the Board's authority to impose
3 a diverse variety of terms and conditions are quite
4 broad, as long as they are connected in some rational
5 way to the public interest.

6 These decisions include examples of terms
7 or conditions that require changes in government
8 policy, documents and guidelines, not only of the
9 proponent, but of other relevant regulatory agencies.

10 In light of the discussion that we just
11 had, I think it might be advisable to briefly refer to
12 one of these decisions, and that is the Environmental
13 Assessment Board decision in the Highway 416 case. It
14 is dated July 31st, 1987. I have not reproduced this
15 case at this time; however, if the Board feels it is
16 necessary to do so, I am prepared to file that at a
17 later time.

18 As you may know, Mr. Chairman, one of the
19 main issues in this case was road noise and methods to
20 measure and mitigate road noise. The proponent was the
21 Ministry of Transportation and Communications and the
22 MTC had a policy document that was signed jointly by
23 the MTC and the Ministry of the Environment that set
24 out a protocol to measure road noise and to determine
25 when and how mitigative actions were to be undertaken

1 if noises exceeded a particular level.

2 In essence, the protocol established that
3 only mitigative measures would be taken on the highway
4 right-of-way. The proponent argued that the reason for
5 this restriction was that mitigative measures taken off
6 the right-of-way would be prohibitively expensive and
7 administratively difficult to implement.

8 However, the Board essentially rejected
9 that argument and stated that administrative difficulty
10 is not a sufficient reason to exclude off-site
11 mitigation measures. And the Board did in fact impose
12 a condition of approval that required the proponent to
13 devise a new noise assessment program that was
14 satisfactory to the Ministry of the Environment.

15 I think that is significant because that
16 was a term and condition that effectively required the
17 participation of a non-party essentially -- well, I
18 guess it was a party but it was not the proponent.

19 Secondly, and more importantly, the Board
20 required that if noise levels exceeded a particular
21 decibel level, the Board directed the MTC to negotiate
22 with effective homeowners to provide off-site
23 mitigation.

24 In my view, Mr. Chairman, this is
25 significant because the Board clearly was not bound --

1 or felt it was bound by this policy document that had
2 been signed by both ministries and, in fact, the Board
3 determined it was necessary to impose a condition that
4 required a substantial change in that policy document.

5 There are, of course, other examples from
6 previous Joint Board and Environmental Assessment Board
7 decisions, it is not my intention to review them at
8 this point; however, we may well revisit them next
9 week.

10 The fourth submission that we are going
11 to make in support of our position is that the Court of
12 Appeal decision and the Supreme Court of Canada
13 decision in the Township of Innisfil case is binding
14 and persuasive in this matter. As you know, Mr.
15 Chairman, this case held, as my friends have indicated,
16 that administrative tribunals deciding broad questions
17 and broad policy are not necessarily bound by policy
18 statements issued by the government.

19 We agree with Ms. Cronk's submission that
20 this Board is in a position that is analogous to that
21 of the OMB before the court in that matter.

22 The fifth and final general submission
23 that we would make in support of our position is that
24 following the reasoning in the Innisfil case, there are
25 no MNR policies, directives or documents that are

1 beyond the reach of this Board. And I would take that
2 one step further, Mr. Chairman, I would submit that
3 there are no Cabinet policies, no ministerial policies,
4 no internal MNR directives or procedures that cannot be
5 effected in some way by this Board.

6 If the procedures, directives or policies
7 are relevant to the issue before this Board, the Board
8 does have a positive obligation to review those and to
9 impose terms and conditions that may require a change
10 in those matters.

11 THE CHAIRMAN: Thank you, Mr. Lindgren.

12 MR. LINDGREN: Two final points, Mr.
13 Chairman.

14 Rather than doing that, perhaps I will
15 just summarize what our position will be; and, that is,
16 that where government policy, whether it is MNR policy
17 or some other government policy, is relevant to this
18 undertaking or to the methods of carrying out this
19 undertaking, the Board has a positive duty under the
20 Environmental Assessment Act to review these documents
21 and to require changes where the Board deems these
22 changes to be necessary.

23 The terms and conditions that are imposed
24 must, of course, be related to the issues before the
25 Board, there has to be a rational relationship or a

1 causal connection, a nexus of some sort between the
2 term and condition and the issues before the Board.
3 And where there is a connection, where there is some
4 evidence before the Board to justify the imposition of
5 that term or condition, then we would submit that the
6 Board has a clear and unfettered discretion to impose a
7 variety of terms and conditions.

8 Just finally, Mr. Chairman. Based on
9 what Ms. Murphy has indicated earlier, it is likely
10 that this matter will be revisited at some point in the
11 future. If this matter is going to be dealt with at a
12 future date, we would respectfully suggest that this
13 matter could be dealt with in Toronto perhaps on a
14 Friday if the Board feels that's appropriate.

15 It is my submission that if the Board
16 requires further submissions, then it should certainly
17 set aside a further date to hear these submissions.

18 THE CHAIRMAN: Thank you.

19 Mr. Campbell?

20 MR. CAMPBELL: I think Mr. Hanna has
21 submissions on this matter first, Mr. Chairman.

22 THE CHAIRMAN: Mr. Hanna?

23 MR. HANNA: Thank you, Mr. Chairman. I
24 won't try to enter into all the legalities of this. As
25 you are well aware, I am not qualified in that respect.

1 What I do want to do is bring to the
2 Board's attention two matters that I think are
3 important in terms of how you might exercise your
4 powers.

5 What I have done is gone through
6 basically the same analogy that Ms. Murphy and Ms.
7 Cronk articulated much better than I ever will in terms
8 of the powers of the Board and how those powers are
9 conveyed in particularly Section 12(2).

10 The one thing I think that is very
11 important for the Board to note with respect to Section
12 12(2) is the fact that there is a differentiation there
13 between the environmental assessment and the
14 undertaking and that the Board has the power under
15 Section 12(2)(c) to accept or to amend and accept the
16 environmental assessment. And that raises the question
17 then of what is the environmental assessment, and what
18 powers the Board has with respect to the environmental
19 assessment. And Sections 12(2)(d) and (e) pertain to
20 the undertaking.

21 Now, if you take the undertaking as it is
22 put out in bold face terms in the environmental
23 assessment itself, Exhibit 4, it is basically the four
24 activities that you have heard about in terms of timber
25 management. The question then arises as to what terms

1 and conditions are appropriate to that undertaking that
2 you then can - how should I say - expand your scope of
3 jurisdiction to deal with perhaps some of these other
4 things.

5 And I have gone through -- I have a
6 written discussion of how I can see that possibility
7 evolving. I don't think it's appropriate to take the
8 Board's time at this time to do that, I am quite
9 prepared to submit that written material to you.

10 I do think it is important though that
11 that differentiation in terms of the environmental
12 assessment and the undertaking and what actually
13 constitutes the undertaking and what constitutes the
14 environmental assessment in this case is very important
15 and, in that respect, in the written submission that I
16 will give you I think the fact that this is a class
17 environmental assessment raises a number of important
18 questions in terms of how that section of the Act
19 should be interpreted.

20 THE CHAIRMAN: Thank you.

21 Mr. Edwards?

22 MR. EDWARDS: I have no submissions,
23 thank you, Mr. Chairman.

24 THE CHAIRMAN: Thank you.

25 Mr. Campbell?

1 MR. CAMPBELL: Thank you, Mr. Chairman.
2 I have asked Ms. Seaborn to distribute material which
3 we have provided. We have a statement of fact and law
4 which we would like to provide to the Board.

5 MS. SEABORN: (handed)

6 MR. CAMPBELL: I don't propose to go
7 through it in any detail in light of the circumstances
8 and the hour, and there are just a few points I would
9 like to make, but I think both the position and the
10 argument in submissions in support of that position are
11 set out in the factum.

12 There is provided to the Board with the
13 factum a list of authorities which unfortunately we
14 haven't had the opportunity to bind, but we have
15 numbered each according to the list of authorities on
16 the front for ease of reference.

17 If I could just refer to a few points in
18 the statement of fact and law, we set out on page 2 the
19 issues which counsel were asked to address. These are
20 virtually drawn from your statement, Mr. Chairman, on
21 the record as to the matters of concern to the Board.

22 Turning to page 3, I would just like to
23 emphasize again that it is quite clear that in order
24 for the Board to depart from the exercise of its own
25 personal judgment on any matters, be it policy or

1 otherwise, would require clear, precise statutory
2 direction.

3 And if you turn over to paragraph 9 of
4 the factum, I think that is as good a statement as you
5 are going to find, drawn from De Smith, indicates that:

6 Authorities entrusted with statutory
7 discretion, be they executive officers,
8 members of tribunals, are...entitled
9 to and are often obliged to take into
10 account consideration of public policy
11 but this will not absolve them from
12 their duty to exercise their personal
13 judgment in individual cases.

14 That's a condensation of the wording in
15 De Smith and I would recommend the full text to you,
16 but I think that captures the essence.

17 I might speak as well to this matter of
18 14(1)(b), it is dealt with at paragraph 13 of the
19 factum. It is clear, in our submission, that the
20 Board's discretion to impose terms and conditions is
21 unfettered. I think it is also fair to say that
22 subsection 14(1)(b) of the legislation that speaks to
23 the Minister's authorities illustrates the broad nature
24 of the kinds of terms and conditions that are
25 contemplated by this legislation, but I agree entirely

1 with Ms. Cronk's submissions that the Board is not
2 limited to that enumeration.

3 The matter of policy has been dealt with
4 in previous Board decisions -- has been dealt with in
5 those decisions and paragraphs 14 through 16 point out
6 that, for instance in the Southwestern Transmission
7 case, the Board in that case made it quite clear not
8 only that it was prepared to consider the merits of
9 government policy, but it found no inconsistency in
10 doing so recognizing that on application a Board
11 finding which might be inconsistent with government
12 policy would in fact go to the Cabinet, the Cabinet
13 would have before it the considered views both of the
14 Board and the original rationale for the policy and has
15 the perfect authority to decide that the Board's view
16 of that policy ought to be discarded and the original
17 view reinforced or vice versa if it was persuaded by
18 the Board's reasons.

19 I think for that reason in particular I
20 would support Ms. Cronk's submission that it is highly
21 desirable - I won't put it on a higher footing than
22 that - but I will say it is highly desirable if the
23 Board is going to comment on policy that it put forward
24 in the clearest possible terms the rationale for their
25 recommended departure.

1 It also is interesting to note that in
2 the Southwestern Ontario Transmission case the Board
3 went on to say, as I point out in paragraph 16, that in
4 fact such consideration of policy was very often the
5 first time that such policy was available for public
6 discussion and review of the rationale behind it, and
7 that that served a useful purpose both for the
8 government and in connection with determining the
9 appropriate application of that policy with respect to
10 the particular undertaking before the Board.

11 I draw the Board's attention to paragraph
12 28 of the factum which - having drawn from paragraph
13 24, the argument that's developed from paragraph 24
14 on - concludes that the administrative directives that,
15 in the Ministry of the Environment's submission, can be
16 amended by the Board would include the Timber
17 Management Planning Manual, the Moose Habitat
18 Guidelines, Tourism Guidelines, Fish Guidelines,
19 matters which are relevant to timber management on
20 Crown lands.

21 We don't intend that to be an exhaustive
22 list, of course, but I think the paragraphs leading up
23 to paragraph 28 develop the rationale for including all
24 of those materials in the list of matters which are the
25 proper subject of terms and conditions by the Board

1 should the Board be persuaded to impose such terms and
2 conditions.

3 In paragraph 29 we refer to the same
4 section of the Court of Appeal decision in the
5 application under the Consolidated Hearing Act, it was
6 a stated case to clarify questions with respect to,
7 again, an Ontario Hydro transmission case.

8 If the Board on the last page of our
9 factum could make a correction. The reference there is
10 to page 75, it should be to page 74. That language is
11 actually in the Divisional Court decision, and if the
12 Board would just note that at page 86 of the same
13 citation, the specific answer to the specific question
14 that was being discussed at page 74 is affirmed by the
15 Court of Appeal at page 86 and the material, both the
16 Divisional Court and Court of Appeal cases, are found
17 together.

18 I think, having just drawn your attention
19 to some of the particular matters dealt with, I would
20 like to state clearly that it is the position of the
21 Ministry of the Environment that in approving an
22 environmental assessment the Board has the jurisdiction
23 pursuant to Sections 2 and 12(2)(e) to impose terms and
24 conditions pertaining to timber management activities
25 in the area of the undertaking which may be at variance

1 with administrative directives promulgated under the
2 authority of the proponent.

3 It is further submitted that the Board
4 has the jurisdiction to make orders in respect of
5 matters which are currently the subject of government
6 policy. I don't think that that submission is in
7 disagreement with any of the submissions that have been
8 made to you today.

9 Now, having said that, I should have
10 noted that there were two other corrections I wanted to
11 make to the citations which I take responsibility for
12 putting down some wrong page numbers, and if the Board
13 could turn to paragraph 8, which I guess is on page 5,
14 there are a list of four citations in various aspects
15 of the Barrie and Innisfil cases. On the third case,
16 the reference is to pages 316 to 318, if you would
17 simply substitute page 315 for those references, and on
18 the final reference under that paragraph it says at
19 154, it should be at 173 to 175.

20 Now, Mr. Chairman, I have really just
21 breezed over the submissions that we have made. You
22 have the rationale for those submissions contained
23 within the factum, and either at this time or at any
24 later date we would be pleased to answer any questions
25 the Board may have in respect of the matters dealt

1 with.

2 THE CHAIRMAN: Thank you.

3 Mr. Colborne, you arrived late, do you
4 have any submissions to make with this first issue we
5 are dealing with?

6 MR. COLBORNE: Not on the matters
7 presently before the Board. Thank you, Mr. Chairman.

8 THE CHAIRMAN: Thank you.

9 MR. CAMPBELL: Mr. Chairman, I might just
10 say that if it was convenient to other parties and, in
11 light of the circumstances, if the Board -- there is
12 another matter that the Board has to deal with and
13 there is the scoping with respect to the Baskerville
14 appearance that was going to be dealt with tonight, it
15 would certainly be convenient I think --

16 THE CHAIRMAN: Sorry, that was tomorrow
17 night I believe.

18 MR. CAMPBELL: Was it tomorrow night?

19 MR. MARTEL: Yes.

20 MR. CAMPBELL: Well, in any event, as I
21 understood it, the Board was intending to come up next
22 Sunday night and I thought in light of the
23 circumstances I might suggest that it might be
24 preferable to perhaps do that in Toronto on Monday and
25 come up Monday night.

1 I thought it might give the Board under
2 the circumstances a little more flexibility and I put
3 that forward for your consideration.

4 ---Discussion off the record

5 THE CHAIRMAN: Well, we are trying to
6 arrange whatever we can that's convenient to most of
7 the parties. We think under the circumstances - and,
8 frankly, I won't be able to advise the parties probably
9 until some time tomorrow as to when we will be
10 reconvening, I hope it will be next Monday, but I can't
11 tell at this point - what we are suggesting is, is that
12 we can arrange for Mr. Turkstra to be up any of the
13 nights next week on relatively short notice. We would
14 do the Baskerville scoping exercise at the first
15 available opportunity.

16 As far as returning to this, I don't
17 think we really have to spend a lot of time returning
18 to this and we can fit this in at some appropriate
19 time. We certainly have the benefit of counsels'
20 assistance and we appreciate that.

21 Ultimately I think what will occur, we
22 may not need another full session, we will go through
23 some of this material. I think really what the Board
24 will do is, it is not going to come out with any kind
25 of ruling or anything like that, but it will give an

1 indication, for example, that it considers its powers,
2 if that's the conclusion it reaches, to impose
3 conditions of approval to be unfettered. That will
4 allow the parties to come up with their suggested
5 conditions of approval addressing all documents, if
6 necessary, and we will try and give you that direction
7 as soon as possible.

8 And, as I say, based on what has been
9 produced and based on the Board's own appreciation of
10 the issues, unless we come up with something that is
11 radically different, that will likely be the
12 disposition of this issue. We can probably do that
13 with a very short directive and we will do that in a
14 timely fashion.

15 We have the second matter right now that
16 we think we would like to get to because we are hoping
17 it can be disposed of relatively expeditiously.

18 Ms. Cronk, have you received further
19 instructions?

20 MS. CRONK: Yes, I have, sir, and I have
21 instructions to make submissions to you today with
22 respect to the general standard of conduct and the
23 components of that that we would urge for your
24 consideration.

25 And it is also our instructions, I am

1 prepared to address you on that matter commencing right
2 now.

3 It is also our instructions not to ask at
4 this time for any specific undertaking with respect to
5 any particular counsel in respect of conduct that has
6 occurred to date.

7 On the basis of that, if the Board
8 accepts the submissions that it will receive from us
9 concerning what the standard of conduct should be and
10 makes a ruling to that effect, if there is any breach
11 of that in the future we reserve our rights on behalf
12 of our clients to bring the matter fully before the
13 attention of the Board at that time.

14 So I am in your hands, sir. If you wish
15 to begin now to hear the submissions on the general
16 issue, I am prepared to begin.

17 THE CHAIRMAN: Well, we want to be fair
18 to the other parties as well.

19 Ms. Swenarchuk, I take it you or one of
20 your co-counsel are going to be addressing this issue
21 as to any appropriate standard of conduct as well?

22 MS. SWENARCHUK: Yes, Mr. Lingren will be
23 addressing that. I am here today really out of
24 deference to the Board, I thought it would be proper
25 that I be present.

1 I would prefer not to spend more
2 intervenor funds to be present again, and, quite
3 frankly, it would not be my intention - if this was to
4 be argued here at this moment - to consider it further,
5 not to be present unless the Board instructed me to.

6 THE CHAIRMAN: All right. Well, I think
7 the Board has reached the conclusion, and we have
8 discussed this at some length, that we would be quite
9 prepared to hear submissions from the parties as to
10 what the general standard of conduct should be in
11 dealing with the media from counsel, and we do not wish
12 to go into the specific allegations relating to
13 specific articles that you put before us last week, Ms.
14 Cronk. And, in that respect, I suppose Mr. Lindgren
15 can put forth your views as to the general standard of
16 conduct on behalf of yourself and your client.

17 MS. SWENARCHUK: And I am content with
18 that if we are all absolutely clear that there will be
19 no reference made to any specific articles with
20 relation to any specific counsel during that
21 discussion.

22 THE CHAIRMAN: Ms. Cronk, how do you
23 intend to address the standard of conduct?

24 MS. CRONK: I thought that issue had been
25 fully determined last week, sir.

1 THE CHAIRMAN: All right.

2 MS. CRONK: And that's the form of notice
3 that went out to all counsel.

4 THE CHAIRMAN: All right. Well, that
5 would be the case, and that's the way the Board would
6 actually prefer to deal with it.

7 Now, rather than start this and finish in
8 the middle, because I think we have to rise in 15
9 minutes, do any of the other parties -- how long would
10 your submissions take? Firstly, let's go to that.

11 MS. CRONK: I would think 15 or 20
12 minutes, sir. You are clearly not going to hear from
13 all counsel today on the issue.

14 THE CHAIRMAN: All right. Well, I think
15 once again we should probably deal with this issue next
16 week during one of the evening sessions.

17 What we are going to try to do next week,
18 because we need six days or six and a half days to try
19 and complete this panel prior to Dean Baskerville's
20 testimony, we are going to try and put in as much time
21 as we can and we will deal with these procedural
22 matters, if they arise, during the evening, including
23 the scoping session.

24 MS. CRONK: Sir, might I ask, to the
25 extent that the Board is able to do so after tomorrow -

1 I understand the difficulties until tomorrow - if an
2 indication could be given as to when you intend to deal
3 with it, because some of us would not otherwise had
4 been here for the full week next week.

5 THE CHAIRMAN: I see. Well, why don't we
6 do that tomorrow. We will try and convey word through
7 Mrs. Devaul to the various parties as to which day
8 would be an appropriate day.

9 I think we would like to talk to Mr.
10 Turkstra first of all because we want to get that
11 scoping session out of the way, that will take priority
12 over this issue for the moment.

13 MS. CRONK: That's fine, sir. Thank you.

14 THE CHAIRMAN: All right. So I think,
15 ladies and gentlemen, unless there is anything further,
16 at this point we will have to adjourn until 8:30 on
17 Monday, subject to further notice.

18 Thank you.

19 ---Whereupon the hearing adjourned at 2:45 p.m., to be
20 reconvened on Monday, November 20th, 1989,
21 commencing at 8:30 a.m.

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